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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1974

No. 74-511

JAMES TRAINOR, Acting Director, Illinois Department of Public Aid,

Petitioner,

vs.

ELVIRA VARGAS, individually, and on behalf of all others similarly situated,

Respondent.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Acting Director of the Illinois Department of Public Aid, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 22, 1974 and the opinion filed by that Court on December 27, 1974 in regard to the issue of waiver of sovereign immunity.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit appears in the Appendix hereto.

ADDITIONAL QUESTION PRESENTED FOR REVIEW

III. Has The State Of Illinois Effectively Waived Its Eleventh Amendment Protection From Suit In This Case?

ADDITIONAL STATEMENT OF THE CASE

On December 27, 1974, the United States Court of Appeals for the Seventh Circuit filed an opinion in this case. The opinion held: (A) that the two notices of reduction of AABD payments sent out by the Department did not meet the requirements of procedural due process. Petitioner withdraws its petition in regard to the issue of adequacy of notice. (B) The Court further held that recovery for the October check was barred as occurring at "a time when petitioner was under no court-imposed obligation to conform to a different standard" citing *Edelman* v. *Jordan*, 415 U.S. at 668, 94 S. Ct. 1347, 39 L. Ed. 2d 66 (1974). (See *Vargas* v. *Trainor* op. p. 11). "Accordingly, an order requiring payment of the October deficiencies in issue here would be retroactive in its application" and, therefore, identical to *Edelman*. "Claims for these deficiencies are therefore barred unless the Eleventh Amendment bar was waived." Petitioner withdraws its petition in regard to the issue of retroactivity of the award. (C) The Court then held that the State had waived its Eleventh Amendment right. It is from the issue of waiver that petitioner brings its petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

A FEDERAL CIRCUIT COURT OF APPEALS IS BARRED FROM INFERRING A WAIVER OF THE STATE'S ELEVENTH AMENDMENT PRIVILEGE BY AN ASSISTANT ATTORNEY GENERAL WHILE ENTERTAINING JURISDICTION OVER A CLAIM FOR RETROACTIVE WELFARE BENEFITS.

A waiver of the State's Eleventh Amendment right must be "stated 'by the most express language or by such overwhelming implications from the text as to leave no room for any other reasonable construction.'" *Edelman* v. *Jordan*, 415 U.S. at 673, 39 L. Ed. 2d 66, 94 S. Ct. 1347 (1974) quoting from *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909); *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973). However, the Seventh Circuit in the case at bar held that the petitioner made a statement to that Court, "through the Attorney General of Illinois, in a memorandum opposing plaintiff's motion for an injunction pending appeal" which "constitutes an unequivocal waiver." (op. p. 11, see Appendix). The statement in the memorandum which the Court refers to is:

> "Plaintiff-Appellant and members of the Class she represents will not be irreparably injured if this Court does not grant an injunction pending appeal. If she is successful on the merits, she will be awarded any benefits wrongfully withheld, presumably while a new notice is sent. . . . However, if an injunction pending appeal is granted and the trial Court's decision is affirmed the State will have no real way of recovering the monies paid out."

The Court held "A representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in *Edelman*. We therefore hold that defendant has deliberately waived the protection of the Eleventh Amendment." It is respectfully submitted that the statement the Court relies on does not approach the standard for waiver of a constitutional right. Waiver of a constitutional right is not lightly to be inferred as the Seventh Circuit did in this instance. In the civil, no less than the criminal area, Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, rehearing denied, 409 U S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 177 (1972); *Emspak* v. *U.S.*, 349 U.S. 190, 99 L. Ed. 997, 75 S. Ct. 687 (1955). For waiver to be effective it must be clearly established that there was a voluntary, intentional relinquishment or abandonment of the constitutional right. *Brookhart* v. *Janis*, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct 1245 (1966). The foundation of the appeal to the Seventh Circuit in this case rested upon the advocacy by the State of its sovereign immunity. The State never intended to abandon this right as the Court infers. Indeed, petitioner vigorously denies having made such a waiver. The language relied upon must, *on its face*, amount to a waiver, *Fuentes* v. *Shevin (supra); Parham* v. *Cortese*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, rehearing denied 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 180 (1973), and there is no express language amounting to waiver in the statement relied upon by the Court, Constructive consent clearly is not a doctrine commonly associated with the surrender of constitutional rights.

Valid consent alone can give the Court jurisdiction to adjudge against a sovereign, and, in the absence of that consent, the attempted exercise of judicial power is void. *U.S.* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 84 L. Ed. 894, 60 S. Ct. 653 (1940). Even if the doctrine of "constructive consent" is invoked, the State may withdraw its consent "whenever it may suppose that justice to the public requires it." *Beers etc.* v. *State of Arkansas*, 61 U.S. 527, 20 How. 527, 15 L. Ed. 991 (1857); *Ford Motor Co.* v. *Dept. of Treasury of State of Indiana*, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945). The sovereign may prescribe the terms and conditions on which it consents to be sued and the manner in which the suit shall be conducted. Thus, even if the statement made by the Assistant Attorney General were to be construed as consent, the State may withdraw the consent by invoking its privilege of sovereign immunity.

Furthermore, the Illinois Assistant Attorney General who appeared on behalf of the Illinois Department of Public Aid in the trial court was without legal power or authority to waive the right of the State to immunity from suit. The statutory powers of the attorney general to appear and defend actions against the State do not give him the power to consent to a suit against the State in Courts when the State has not consented to be sued. *Ford Motor Co.* v. *Dept. of Treasury of Indiana (supra); Palmer* v. *Ohio*, 248 U.S. 32, 63 L. Ed. 108, 39 S. Ct. 16 (1918). See Ill. Rev. Stats., 1973, Ch. 127 § 801 which states ". . . the State of Illinois shall not be made a Defendant or party in any Court." The State's immunity from suit is a privilege which may be waived only by the proper authority. *Great Northern life Ins. Co.* v. *Read*, 322 U.S. 47, 88 L. Ed. 1121, 64 S. Ct 873 (1944); *Petty* v. *Tennessee-Mis-*

souri Bridge Comm., 254 F. 2d 857, reversed on other grounds, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959). Consent by an officer who has no authority to waive the immunity of the State is ineffectual. *Georgia R.R. & Banking Co.* v. *Redwine*, D.C. Ga., 85 F. Supp. 749, reversed on other grounds, 72 S. Ct. 321, 342 U.S. 299, 96 L. Ed. 335 (1952).

The Illinois Attorney General as a matter of law could not waive the Eleventh Amendment defense, *Ford Motor Company* v. *Treasury Department of the State of Indiana*, 323 U.S. 459, 467 (1944). The law is clear in Illinois that an Assistant Attorney General cannot waive the body politic's defense of Sovereign Immunity as it may be incorporated into the Eleventh Amendment prohibition. In *Illinois* v. *Sanitary District*, 210 Ill. 171, 173, 71 N.E. 334, 335 (1904) it was said:

> ". . . the Attorney General cannot, as we think, waive the State's immunity from being placed in the position of a defendant. Nor can he commit or bind the state by filing a cross-petition, the result of which is to place the State in the attitude of a defendant in the proceeding. *Ex Parte Dunn*, 8 S.C. 207; *Dabney* v. *Bank*, 3 Id. 124; *Adams* v. *Bradley*, 5 Sawyer 217; 26 Am. and English Ency. of Law, (2d Ed.) 486.
>
> The authorities seem agreed that where the constitutional exemption can be waived the authority to do so rests with the Legislature. (Citations omitted) We are not called upon to determine whether the legislature under our Constitution could waive the exemption or authorize a suit or proceeding to be brought against the State, as it has not attempted to do so in the case before us."

Likewise see *Powers* v. *Tealeander*, 129 Ill. App. 2d 10, 262 N.E. 2d 342 (1970). The State of Illinois cannot be bound by statements or acts of the Attorney General,

or any of his assistants, which they do not have the right, power, or authority to make. *Harbeck* v. *State of Illinois*, 13 Ill. Ct. Cl. 70 (1943). Other cases which hold that the immunity of a sovereign may not be waived by its attorneys or Attorney General are:

Darnall v. *State*, 79 S.D. 59, 108 N.W. 2d 201, 203 (1961) citing *Arkansas State Highway Comm.* v. *McNeil*, 222 Ark. 643, 262 S.W. 2d 129 and *Dunn* v. *Schmid*, 239 Minn. 559, 60 N.W. 2d 14.

Slezak v. *Ousdigian*, 260 Minn. 303, 110 N.W. 2d 1, 5 (1961).

Charles E. Brohawn & Bros., Inc. v. *Board of Trustees*, 269 Md. 164, 304 A. 2d 819, 820 (1973).

Department of Public Safety v. *Great S.W. Warehouses*, 352 S.W. 2d 493, 494 (1961).

State of Texas v. *Gulf Oil Corp.*, 166 S.W. 2d 197.

It is thus clear that the Circuit Court was barred from inferring a waiver of the State's Eleventh Amendment privilege from a statement made by the Assistant Attorney General.

CONCLUSION

For the reasons stated herein, it is respectfully requested that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 22, 1974, and the opinion filed by that Court on December 27, 1974, in regard to the issue of waiver of sovereign immunity.

Respectfully submitted,

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